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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 945

DANIEL MICHAEL McDONALD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 9) is reported in 22 F. (2d) 747. The opinion of the District Court appears at page 5 of the record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on December 2, 1927. (R. 16.) A petition for rehearing was filed and entertained, but denied on January 12, 1928. (R. 17.) By order of this

Court dated April 10, 1928, the time within which application for certiorari might be filed was extended to and including May 1, 1928. (R. 17.) Petition for certiorari was filed in this Court on April 28, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, who was denied naturalization, contends, in substance, that service on board a vessel of foreign registry owned by a New Jersey Corporation may be treated as a part of the five-year period of residence required by the Naturalization Act.

STATEMENT

Petitioner was denied naturalization by the United States District Court for the District of Massachusetts on the ground that his period of service as master of vessels of foreign registry, although American owned, could not be counted as part of the five-year period of residence required by the Naturalization Act. The vessels upon which he served were owned by the United Fruit Company, a New Jersey corporation, but they were of British registry. The vessels upon which petitioner served made trips between this country and Central America. Petitioner maintained a home

at Boston, Massachusetts, for his wife and child, and of course he lived there between trips. (R. 6.)

The Circuit Court or Appeals also ruled against him, although one judge dissented. (R. 9 and 12.)

STATUTE INVOLVED

As it is the contention of petitioner that the proviso in the statute here involved must be restricted to certain classes of aliens granted special privileges by the Act, we quote here the statutory provisions immediately preceding the proviso so the Court may be able to see the setting of the proviso. The statutory provisions are contained in Section 1 of the Act of May 9, 1918, c. 69, 40 Stat. 542, 544 (U. S. C. Title 8, Secs. 354, 374, 383, 388 and 405), and so far as immediately pertinent, read as follows:

> * * * Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided,* That it shall not be lawful to make a declaration of intention before the clerk of any court on election day

or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: *Provided further,* That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

ARGUMENT

GOVERNMENT DOES NOT OPPOSE GRANTING OF THE WRIT IN THIS CASE

While the opinion of the Circuit Court of Appeals below appears to correctly interpret the proviso here drawn in question, it is true that the Circuit Court of Appeals for the Fifth Circuit has, as pointed out by petitioner, ruled to the contrary in *United States* v. *Nicolich*, decided April 4, 1928, but not yet reported. Petitioner has printed the opinion in that case at page 9 of his petition for certiorari. The service in that case, as in the case at bar, was aboard vessels of foreign registry, but American owned. Indeed the Circuit Court of Appeals in the *Nicolich case, supra*, specifically refused to follow the ruling of the Circuit Court of Appeals in the case at bar.

The United States will shortly file a petition for certiorari in the *Nicolich case*.

CONCLUSION

Because of the conflict of decisions, the United States does not oppose the granting of the writ prayed for by petitioner.

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MAY, 1928.

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